INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	15
Appendices:	
A. Decision of the Court of Appeals for the Fifth Circuit	16
B. Decision of the District Court for the Northern District of Florida	37
C. Statutes Involved	53

CITATIONS

Cases:

American Surety Co. v. *Bethlehem National Bank*, 314 U.S. 314	8
Attorney General ex rel. State Banking Commissioner v. *Michigan National Bank*, 298 Mich. 417, 299 N.W. 129	14
Camden Trust Co. v. *Gidney*, 301 F. 2d 521, certiorari denied, 369 U.S. 886	9
Commissioner of Internal Revenue v. *Estate of Bosch*, 387 U.S. 456	13
Dickinson v. *Tallahassee Bank & Trust Co.*, 2d Jud. Cir., ~~Len~~ Leon County No. 68-30	5
Federal Deposit Insurance Corp. v. *Tremaine*, 133 F. 2d 827	8
First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 339	9, 11, 13
First National Bank v. *Missouri*, 263 U.S. 640	11, 12
First National Bank in Billings v. *First Bank Stock Corp.*, 306 F. 2d 937	9
First National Bank of Logan v. *Walker Bank & Trust Co.*, 385 U.S. 252	5, 9, 10

Cases—Continued

	Page
Franklin National Bank v. *New York*, 347 U.S. 373	13
Howell v. *Citizens First National Bank of Ridgewood*, 385 F. 2d 528	13
Jackson v. *First National Bank of Valdosta*, 246 F. Supp. 134	9
Jackson v. *First National Bank of Valdosta*, 349 F. 2d 71	9, 10
King v. *Order of United Commercial Travelers of America*, 333 U.S. 153	13
Mercantile Nat. Bank v. *Langdeau*, 371 U.S. 555	9
Merchants' Bank v. *State Bank*, 10 Wall. 604	12
New York v. *Feiring*, 313 U.S. 283	8
Roginsky v. *Richardson-Merrell, Inc.*, 378 F. 2d 832	13
Tiffany v. *National Bank of Missouri*, 18 Wall. 409	13
Union Savings Bank of Patchogue v. *Saxon*, 335 F. 2d 718	13
Van Reed v. *People's Nat. Bank*, 198 U.S. 554	9
Whitney Nat. Bank v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290, reversed on other grounds, 379 U.S. 411	9

Statutes:

McFadden Act of 1927, Section 7, 44 Stat, 1228-1229	58
12 U.S.C. 36, formerly Section 7 of the McFadden Act of 1927, 44 Stat. 1228-1229, as amended:	
12 U.S.C. 36(a)	6, 53
12 U.S.C. 36(b)	53
12 U.S.C. 36(c)	2, 6, 8, 10, 11, 14, 55
12 U.S.C. 36(d)	6, 56
12 U.S.C. 36(e)	7, 56
12 U.S.C. 36(f)	2, 3, 4, 5, 6, 7, 9, 10, 13, 15, 56
12 U.S.C. 36(g)	7, 56
12 U.S.C. 36(h)	7, 57
12 U.S.C. 84	11
12 U.S.C. 92a	11
12 U.S.C. 321	14
12 U.S.C. 461 *et seq.*	11
12 U.S.C. 1813(o)	15
12 U.S.C. 1828(d)	15
Florida Statutes:	
Section 659.06(1)(a)	2, 5, 60
Section 659.16	11
Section 659.17	11

Miscellaneous:

	Page
American Banker, January 3, 1969	13
71 Bankers' Magazine 1017 (1906)	12
81 Bankers' Magazine 739 (1910)	12
83 Bankers' Magazine 350b, 732, 805 (1911)	12
84 Bankers' Magazine 746 (1912)	12
12 C.F.R. 204	11
Comment, 32 U. Chi. L. Rev. 148 (1964)	9
68 Cong. Rec. 5816 (1927)	7
H. Rep. No. 583, 68th Cong., 1st Sess. (1924), p. 3	7
Manual for National Banks, Paragraph 2490	3
29 Ops. Atty. Gen. 81	12

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
PETITIONER,

v.

FRED O. DICKINSON, JR., COMPTROLLER
OF THE STATE OF FLORIDA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Solicitor General, on behalf of the Comptroller of the Currency of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 16-36)[1] is reported at 400 F. 2d 548. The opinion of the district court (App. B, *infra*, pp. 37-47) is reported at 274 F. Supp. 449.

---

[1] "App." refers to the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1968 (App. A, *infra*, p. 36). By order of December 9, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including January 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for purposes of the reference in 12 U.S.C. 36(c) to state law as controlling the permissibility of a national bank "branch", the statutory scheme, including the definition of "branch" in 12 U.S.C. 36(f), permits state rules also to control the threshold determination of what banking activities constitute a "branch".

STATUTES INVOLVED

12 U.S.C. 36, formerly Section 7 of the McFadden Act of 1927, 44 Stat. 1228-1229, as amended, is set forth in Appendix C, *infra*, pp. 53-57. The original text of Section 7 of the McFadden Act of 1927 is also set forth in Appendix C, *infra*, pp. 58-59. Section 659.06(1)(a) of the Florida Statutes is set forth in Appendix C, *infra*, p. 60.

STATEMENT

1. Section 36 of Title 12 of the United States Code establishes the conditions under which national banks may establish and operate new "branches". They may do so where state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. 36(c). But this and the other conditions apply only to activities of national banks which constitute "branching".

And 12 U.S.C. 36(f) specifies that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received or checks paid, or money lent."

2. In 1966, the First National Bank in Plant City (Florida)[2] began the operation of an armored car messenger service to and from its office and established an off-premises secured receptacle from which the messenger could pick up items left by customers. The messenger service transports cash and checks from First National's customers to the banking house, where the funds are deposited to the customers' accounts (App. A, p. 19), and also transports from the banking house to the customers cash that has been charged against their accounts (App. A, pp. 19-20). The secured receptacle is located in a shopping center one mile from the banking house, and is available for use by persons maintaining accounts with the bank (App. A, pp. 20-21).[3]

---

[2] First National has separately petitioned for a writ of certiorari in this case (No. 777, this Term).

[3] The armored car messenger service and off-premises receptacle are provided in such a manner as to comply (App. B, pp. 39-41, 50) with Paragraph 7490 of the Manual for National Banks of the Comptroller of the Currency of the United States, which provides:

> To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

3. The bank had obtained approval for this new service from the Comptroller of the Currency of the United States (petitioner herein and hereafter "United States Comptroller"). Shortly after First National inaugurated the service, however, the respondent, Fred O. Dickinson, Jr., Comptroller of the State of Florida (hereafter "Florida Comptroller"),[4] wrote First National that he considered the armored car service and off-premises receptacle in violation of the Florida law prohibiting branch banking, and warned it to cease-and-desist (App. A, p. 21).

First National then brought this action against the Florida Comptroller, seeking declaratory and injunctive relief. The United States Comptroller intervened on the side of First National, while several state banks intervened to support the Florida Comptroller. The district court (App. B, pp. 41-47) determined that provision of these services was in general authorized under the federal banking laws and that state law was no bar. The court ruled that federal law determines what constitutes a branch for purposes of Section 36 (c), that the definition of "branch" in 12 U.S.C. 36(f) is exclusive, and that, on the facts of this case, there was no "branching" and thus no occasion to refer to state law. (App. B, pp. 43-46, 50).

The court of appeals reversed (App. A, pp. 16-36). That court ruled it unnecessary to examine whether the use of the armored car service and off-premises receptacle constituted receiving deposits, paying checks, or lending money away from the main office of the bank, which are the touchstones of the federal definition of

[4] The Florida Comptroller is *ex officio* the State banking commissioner.

"branch" in 12 U.S.C. 36 (f). Subsection (f), the court stated, is "hardly adequate" to determine what is a "branch" (App. A, p. 32). Instead, in the belief that "radiations" from this Court's decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, make State norms pervasive, the court held that the state's definition of the scope of "branching" would be "operative and controlling" (App. A, p. 17). Since the pertinent state statute (Fla. Stat. 659.06(1)(a), App. C, *infra*, p. 60) was unclear and had not yet been interpreted by a state court, the court of appeals accepted the Florida Comptroller's cease-and-desist letter as dispositive, without further analysis than to note that the letter's conclusion "appears consistent with the policy of the state statute" (App. A, p. 34).[5]

REASONS FOR GRANTING THE WRIT

The decision below, that state banking authorities may in effect determine the lawfulness of off-premises services provided by national banks, raises an important question of federal banking law that has not been, but should be, considered by this Court. The holding that state law determines the scope of the term "branch" in 12 U.S.C. 36 is inconsistent with the language and legislative history of the statute and conflicts with the approach taken by other courts of appeals. If

[5] In light, however, of litigation pending in the Florida courts on the interpretation of the Florida statute (*Dickinson* v. *The Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68-30), the court observed that the Florida Comptroller's views would perhaps not be the "final" interpretation of the Florida law. Accordingly, the case was ordered remanded to the district court for entry of a decree in the Florida Comptroller's favor, but without prejudice to reconsideration if "Florida law is ultimately determined to be different than here expounded." (App. A, p. 35).

it stands, the decision below will significantly impede the functioning of national banks by shifting control over a large segment of their activities, not heretofore considered "branching", to the state banking authorities.

1. The development of the national banking system and the determination of the powers and functions of national banks have involved many carefully considered congressional judgments. Section 36, which originated as Section 7 of the McFadden Act of 1927, sets forth the conditions under which national banks "may retain or establish and operate a branch or branches". And subsection (f) specifically provides, "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent." This definition of the scope of Section 36 is relevant not only to the incorporation of state law under Section 36(c) with respect to the establishment of new branches. It governs also matters as to which state law has no pertinence at all: the retention of "branches" in operation at the time of enactment of the McFadden Act [Section 36(a)];[6] the minimum aggregate capital requirements for all "branches" [Section 36(d)]; the requirement that the United States Comptroller alone consent to a national bank's change

[6] Branches authorized under subsection (a) need not even be in the national bank's home state. Thus, under this subsection (a), the Bank of California, a national bank whose main office is in San Francisco, operates branches in Oregon and Washington, and the First Camden National Bank and Trust Company, Camden, New Jersey, operates a branch in Philadelphia, Pennsylvania.

in the location of a "branch [Section 36(e)]; and the establishment of "branches" in dependencies, insular possessions and foreign countries [Section 36(g)].

Thus, the structure of Section 36 as a whole renders anomalous any suggestion that a court should look elsewhere than to subsection (f) to determine what is a "branch" for purposes of any of the other subsections. And the error in referring to state law for definition is made even more clear by an examination of the text and legislative history of the original 1927 Act (App. C, *infra,* pp. 58-59). In Section 7 of the McFadden Act Congress specifically referred to state law when it wished it to apply (see subsections (e) and (h)). Had Congress intended to incorporate state law to enlarge the definition of "branch", it thus knew well enough how to express such an intent. Instead, subsection (f) sets out independent federal standards as to what constitutes a "branch". Indeed, Representative McFadden made it clear at the time of enactment that Congress itself did intend to fix the definition. Speaking of subsection (f), he stated that it

> *defines the term "branch."* Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting business carried on at the main office, is a branch * * * [Emphasis added]. [68 Cong. Rec. 5816 (1927)].[7]

The court of appeals dismissed subsection (f) as

---

[7] Similarly, H. Rep. No. 583, 68th Cong., 1st Sess. (1924), p. 3, observes, "*The term 'branch' or 'branches' is defined* so as to include any form of office established outside of the bank for the purpose of receiving deposits, cashing checks, or making loans." (Emphasis added).

"hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking." (App. A, p 32). The premise is sound, but the conclusion erroneous. Rather, the congressional decision to define "branch" in traditional terms manifested an intention that the coverage of all of the conditions specified in Section 36 should be uniform, and not subject to the vagaries of the laws of the several states. Certainly, Congress did not intend that the application of the purely federal conditions in Section 36 should vary from state to state, and it would be anomalous to give "branch" in subsection (c) a meaning different from that in the other subsections.

Thus, the court of appeals' reading of Section 36(c) seriously distorts the meaning of this vital section of the national bank legislation. It ignores the well settled principle that, unless Congress clearly intended otherwise, words in a federal statute—"[i]ntended to be nation-wide in its application"—are to be given a federal meaning, *even where* Congress has not provided for any explicit definition. *New York* v. *Feiring,* 313 U.S. 283, 285; *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316.[8] This rule is especially pertinent where national banks are involved:

> "National Banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress

[8] See, also, *Federal Deposit Insurance Corp.* v. *Tremaine,* 133 F. 2d 827, 828-829 (C.A. 2).

> and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit." * * *

Mercantile Nat. Bank v. *Langdeau,* 371 U.S. 555, 558-559, quoting *Van Reed* v. *People's Nat. Bank,* 198 U.S. 554, 557. Because national banks are "federal instrumentalities" their activities are generally immune from state restrictions except as Congress may expressly provide to the contrary. See *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

2. The Fifth Circuit's decision conflicts with the approach taken by at least two other courts of appeals. See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521 (C.A.D.C.), certiorari denied, 369 U.S. 886; *First National Bank in Billings* v. *First Bank Stock Corp.,* 306 F. 2d 937 (C.A. 9); see also *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.,* 323 F. 2d 290 (C.A.D.C.), reversed on other grounds, 379 U.S. 411. In those cases the issue was whether certain activities by national banks or their directors constituted the establishment of a "branch" for purposes of 12 U.S.C. 36. In *Camden Trust,* the court expressly held that there was no branching even though the dissenting judge pointed out that state law was to the contrary: "Beyond peradventure, Congress * * * defined the term 'branch.'" 301 F. 2d at 524.[9] The Ninth Circuit similarly resolved the question without reference to state law notions.

---

[9] Accord, *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134, 138 (M.D. Ga.); Comment, 32 U. Chi. L. Rev. 148 (1964).

In *Jackson* v. *First National Bank of Valdosta,* 349 F. 2d 71, the Fifth Circuit had apparently recognized that, at the very least 12 U.S.C. 36(f) sets outer federal-law limits on the scope

The court below recognized this conflict, and conceded that no other reported decision since the McFadden Act was passed in 1927 had given the states the power to determine what off-premises activities may be restricted as "branching." But it considered that the question was controlled by this Court's intervening decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252. (App. A, pp. 24-25.) Surely, this is an improper interpretation.

The *Walker Bank* case in no way indicates that the definition of "branch" in 12 U.S.C. 36(f) is rendered superfluous by state law concepts. In *Walker Bank,* all parties assumed, quite soundly, that the new offices involved constituted "branches" and thus that Section 36(c) was applicable. The only question before the Court was whether, under Section 36(c), state law controls not only whether and where national banks may establish "branches" but also by what method. In that context, this Court stated that "Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added). But nothing in the policy relied on by this Court for equality of opportunity in establishing new "branches" warrants the jump made by the court below in holding that Congress has remitted to the states the threshold question of defining the class of activities as to which there is to

---

of 12 U.S.C. 36(c). After discussing the interaction of the two subsections, the court concluded (349 F. 2d at 72): "* * * a national banking association is precluded from opening any office *at which deposits are received, checks paid, or money lent* unless a similarly situated state bank would be authorized under state law to open a similar office." (Emphasis added.) That is, unless "deposits are received, checks paid, or money lent," there can be no "branch" under federal law.

be "competitive equality." This Court should now make it clear that "competitive equality" is not a talisman that empowers the states to restrict whatever, for their purposes, they may call branching.[10]

3. The decision below opens the way to serious state limitation of the off-premises services that can be offered by national banks. The court's theory that state law determines the definition of "branch" will permit a state to define any off-premises activity as branching, and, by so doing, confine the service activities of national banks to the banks' four walls if the state so chooses.

Before the enactment of the McFadden Act, national banks did not have the power to establish "branches". *First National Bank* v. *Missouri,* 263 U.S. 640. But they did have the power to conduct other off-premises activities. As this Court long ago recognized, the "business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person,

[10] Except in the limited areas where Congress has specifically incorporated state law into the federal banking laws, as in 12 U.S.C. 36(c) (or, *e.g.,* 12 U.S.C. 92a), any goal of "competitive equality" is chimerical. Inherent in two *different* systems of banking are relative advantages and disadvantages for each. For example, under Section 659.16 of the Florida Statutes, state banks may maintain their legal reserves in interest-bearing obligations of the United States or in obligations guaranteed by the United States, whereas national banks, under 12 U.S.C. 461 *et seq.* and 12 C.F.R. 204, must maintain their reserves in the form of non-income producing deposits at the Federal Reserve Bank. Similarly, under Section 659.17 of the Florida Statutes a state bank may lend to a single customer up to 10% of capital and surplus, unsecured, and up to 25% of capital and surplus on a secured transaction, whereas a national bank, under 12 U.S.C. 84, is limited to 10% of capital and surplus regardless of security. National banks, as this Court has only recently reiterated, are immune from state sales and use taxes on tangible personal property. *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

or by correspondents or other agents." *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 651. Similarly aware of the practicalities of the banking business, this Court, in *First National Bank* v. *Missouri, supra,* 263 U.S. at 658, specifically agreed with a 1911 opinion of the Attorney General which had concluded that there is "a wide difference" between "the right to establish branch banks at which a general banking business is carried on" and "the appointment of agents to receive and collect money and forward it to the bank." 29 Ops. Atty. Gen. 81, 90.

Included among the off-premises, non-"branch" services performed by national banks even before the McFadden Act was the operation of armored car messenger services, the very activity involved here.[11] In addition, national banks today conduct a multitude of off-premises activities, including new-business solicitation, loan closings, sale of money orders and travellers' checks, banking by mail, credit card services, various correspondent services, and data processing. Some banks even maintain their trust departments in separate buildings from the main bank. It is inconceivable that, without expressly so providing, Congress could have intended that the lawfulness of all of these functions turn on state definitions of "branch".

The court of appeals conceded that under its theory, "national banks may well fear the authority of state comptrollers to make extreme use of * * * this * * * defining process". (App. A, pp. 33-34).[11a] Such novel and

---

[11] 71 Bankers' Magazine 1017 (1906); 81 Bankers' Magazine 739 (1910); 83 Bankers' Magazine 350b, 732, 805 (1911); 84 Bankers' Magazine 746 (1912).

[11a] The Georgia banking commissioner, for example, has quite recently ruled illegal certain loan-production activities of a na-

disruptive results, however, are not compelled by the terms of 12 U.S.C. 36(c) and (f). They are contrary to the general policy of the federal banking laws to have a system of national banks serving as active, not passive, competitors, *Franklin National Bank* v. *New York*, 347 U.S. 373, 377, and shielded, except where expressly provided to the contrary, from the "hazard of unfriendly legislation by the States," *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 413; see also *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339. While the court below suggested that it was deferring to state law only in "penumbral" areas (App. A, p. 32), the only possible line to demarcate the edge of the "penumbra" is between on-premises and off-premises banking activity. Any off-premises banking activity would appear to be within the penumbra and thus within the court's holding.

The danger posed by the court of appeals' view of the role of state law is seriously aggravated by its acceptance—in the absence of any pertinent state court decision—of the Florida Comptroller's letter as an authoritative interpretation of an unclear state statute. (App. A, pp. 34-35). This approach is contrary to that taken in *Howell* v. *Citizens First National Bank of Ridgewood*, 385 F. 2d 528 (C.A. 3), and *Union Savings Bank of Patchogue* v. *Saxon*, 335 F. 2d 718, 723 (C.A.D.C).[12] It is especially unjustified in view of the

tional bank, explaining to the bank: "As you probably know, the Fifth Circuit Court of Appeals has ruled that the National Bank Act requires that national banks conform to state banking authorities' definitions of branch banking." American Banker, January 3, 1969, p. 1, col. 2, p. 13, col. 3.

[12] Compare *Commissioner of Internal Revenue* v. *Estate of Bosch*, 387 U.S. 456, 465. See also, *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153, 160-162; *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 851 (C.A. 2).

fact that in many states (not including Florida) the state banking departments, either by law or custom, are controlled by persons from or associated with state banks.[13]

Another result of the view taken by the court below would be that—despite the fact that 12 U.S.C. 36(c) provides only for approval by the United States Comptroller as a prerequisite to establishment of a national bank branch—the United States Comptroller would not be able to give authoritative advice as to whether an existing or proposed off-premises activity is a "branch". The exclusively federal administrative system would be complicated by the necessity that national banks obtain rulings from state banking authorities in order to be sure that an existing or proposed activity is legal. Contra, *Attorney General ex rel. State Banking Commissioner* v. *Michigan National Bank*, 298 Mich. 417, 437, 299 N.W. 129, 136. And, indeed, the federal authority would be unable to determine whether or not an activity is one for which its approval is required under the statute until it knew whether the state authorities considered it a "branch." The effect would be unacceptable disruption of the administration of the federal banking laws.[14]

---

[13] The United States Comptroller advises us that in 14 states the state banking commissioners are former state bankers, while in only four states are the commissioners former national bankers. Perhaps more significantly, of the 30 states having state banking boards, in at least 21 of those states either by law or custom a majority of the members of the boards are composed of state bankers. In eight states, this majority is required by law.

[14] The decision below may also significantly alter the administration of the federal banking laws with respect to *state* banks. The provisions of 12 U.S.C. 321 pertaining to the conditions on which state member banks of the Federal Reserve System may establish

CONCLUSION

Because the court below has erroneously decided an important federal question, this petition for a writ of certiorari should be granted.[15]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

JOHN C. ELDRIDGE,
ROBERT E. KOPP,
Attorneys.

C. WESTBROOK MURPHY,
Office of Comptroller of the Currency.

January 1969.

"branches" are keyed to the conditions imposed on national banks under 12 U.S.C. 36. Likewise, since 12 U.S.C. 1813(o) defines "branch" in terms virtually identical with 12 U.S.C. 36, control by the Federal Deposit Insurance Corporation through 12 U.S.C. 1828(d) over branching by state nonmember insured banks would undoubtedly be modified by the court of appeals' decision. While the exact impact of the court's decision in these areas is not clear, it is plain that these other federal banking authorities would have to re-examine their own authority in light of the Fifth Circuit's decision.

[15] If this Court should decide that federal law does determine the definition of "branch" in 12 U.S.C. 36(f), the question is then presented as to whether First National's armored car service and off-premises receptacle constitute "branches" within the meaning of the statute. We submit that the district court's finding that First National's activities do not constitute "branching" is well-supported.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25173

FRED O. DICKINSON, JR., Comptroller of the State of Florida, ET AL, *Appellants,*

VERSUS

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, ET AL, *Appellees.*

Appeal from the United States District Court for the Northern District of Florida

(September 12, 1968)

Before TUTTLE and GOLDBERG, Circuit Judges, and HOOPER, District Judge.

GOLDBERG, Circuit Judge: This case involves a meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres. The Comptroller of the State of Florida, supported by intervening state banks, contends that First National's shopping center receptacle and armored car messenger service constitute "branch banking" in violation of Section 659.06 (1) (a) of the Florida Statutes[1] and

---

[1] 659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such

that the authority for engaging in such activities is therefore denied by the specific terms of Section 36 (c) (1) of the National Banking Act, 12 U.S.C. 36 (c) (1).[2] First National, supported by the Comptroller of the Currency of the United States as intervenor, contends that its activities do not constitute "branching" as defined in Section 36(f) of the National Banking Act[3] and therefore are not within the coverage of Section 36(c) or Florida Section 659.06. The district court granted judgment for First National, stating explicitly: "Florida statute 659.06(1)(a) is not operative or controlling in this instance." We conclude that in this instance Florida law is operative and controlling and reverse.

For the purpose of the disposition of this case on appeal and in view of our reversal in favor of the state comptroller, we adopt the statement of facts as presented by the United States Comptroller. The armored

---

approval shall be in such form and contain such information as the Commissioner may require.

* * *

[2] § 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(c) A national banking association may, with the approval of the Comptroller of Currency, establish and operate new branches:

(1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;

* * *

[3] § 36(f): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

car service and off-premises receptacle at issue in this litigation were established in 1966. In August, 1965, First National inquired of the Comptroller of the Currency about the Comptroller's position on a national bank operating an armored car messenger service. The bank received a reply observing that such a service could properly be provided if the conditions established by the Comptroller's ruling in paragraph 7490 of the Comptroller's Manual were satisfied. Paragraph 7490 provides:

> To meet the requirements of its customers, a Nation Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

The bank subsequently inquired of the Comptroller of the Currency whether the bank could establish a receptacle at a shopping center for the receipt of night bags containing money and checks, which would be recovered daily from the receptacle by the messenger and taken to the bank for deposit. The Comptroller's regional counsel advised:

> A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks. The receptacle should contain thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent

> for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. Such a service would not constitute branch banking as defined in 12 U.S.C. 36(f).

Relying on these letters, First National in September, 1966, began operating an armored car service and an off-premises receptacle. These services were established according to the procedures described below.

The armored car messenger service was provided to call at a customer's place of business to pick up cash and checks for the purpose of transporting them to First National's banking house, where they would be deposited to the customer's account. The customers who used the service all had an account with the bank. Prior to using the service they signed a "Comprehensive Dual Control Contract" which provided that First National's messenger transported the monies to the banking house as the agent of the customer. When a customer sent funds to the bank, he accompanied them with a transmittal slip on which he itemized them. The transmittal slip contained a "Contract" which provided that the bank was acting as the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." Both the transmittal slip and the Comprehensive Dual Control Contract provided that the bank was maintaining hazard insurance for the protection of the principal.

The messenger service was also used to transport cash to those customers who had signed the Comprehensive Dual Control Contract. The Contract provided that in this situation, also, the bank's messenger would be

acting as the agent of the customer. Sums transported to the customer by this method were accompanied by a charge slip indicating that the customer's account had been charged for the amount of the order. A common use of this service was the delivery of coins to be used as change by businesses.

The messenger service operated daily, six days a week. The armored car was owned by the bank, and operated by employees of the bank. The bank also purchased the insurance coverage for the operation. Customers were not charged for the service.

In a shopping center located one mile from its banking house, First National leased an area where it provided a secured receptacle for persons maintaining an account with the bank. The bank's customers who signed the "Comprehensive Dual Control Contract" were issued a key so that they could place night bags containing cash and checks in the receptacle. Additionally, other customers with an account at the bank could use the receptacle by placing their funds in the receptacle in an envelope containing the money and a transmittal slip. The envelopes and transmittal slips were provided at the receptacle. The envelopes stated that the funds transported were accepted in accordance with the contract printed on the transmittal slip, which was the same transmittal slip used with the armored car messenger service. In bold letters at the receptacle a sign stated:

> The messenger who will recover the funds in this receptacle twice daily is acting as the agent for the customer. The funds will not be deemed a deposit until delivered to the bank's premises at 302 W. Haines Street. Insurance coverage for the protection of the funds is provided by the First National Bank in Plant City.

The armored car transported the funds placed in the receptacle to the banking house.

Shortly after First National had placed the two services into operation, the State Comptroller advised the bank that its armored car and shopping center receptacle activities violated Florida law and requested the bank to cease and desist from these operations. First National then brought this action for declaratory relief and an injunction against the State Comptroller, contending its activities were authorized by paramount federal law and thus could not be interfered with by the state authorities. The defendant state banks intervened on the side of the State Comptroller, and the federal Comptroller intervened as a plaintiff.

The district court, by a decision of May 6, 1967, awarded partial summary judgment in favor of First National and the federal Comptroller. The court ruled, as a matter of federal law, that the definition of "branch" in 12 U.S.C. § 36(f) was exclusive, and that under that definition there was no "branch" involved here; thus the state law, incorporated into federal law by 12 U.S.C. § 36(c), did not apply.

On June 2, 1967, the district court issued its final judgment, declaring that the messenger service and off-premises receptacle as authorized by the federal Comptroller were not branches within the meaning of 12 U.S.C. § 36 (and the related provision, 12 U.S.C. § 81) and did not violate Florida law. The court limited the judgment to declaratory relief and did not issue an injunction (due to the state Comptroller's stipulation of intent to abide by the district court's order without further injunctive relief).[4]

[4] The above statement of facts is found at pp. 2-8 of the United States Comptroller's appellate brief. Contestations of these facts concern the extent of First National's continuous compliance with the above procedures relating to contract and agency. We do not find such disputes relevant in light of our decision.

The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute "branch banking." Our answer to that issue will require an excursion into statutory history and case and statutory analysis.

Justice Clark, in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company,* 1966, 385 U.S. 252, 87 S.Ct. 492, 17 L. Ed. 2d 343, capsulates the early history of our national banking system, which was born in anguish and stunted in its early growth. Competition between state and federal banking systems was bound to breed conflicts, and until 1927 federal banks were handicapped considerably by the lack of statutory authority to establish branches, even in states which allowed branch banking. See *First National Bank in St. Louis* v. *Missouri,* 1924, 263 U.S. 640, 44 S.Ct. 213, 68 L. Ed. 486.[5] In 1927 Congress passed what became known as the McFadden Act, which sought to relieve federal-state abrasions through statutory complementarianess. The McFadden Act permitted national banks to establish branches inside the municipality of the

[5] Although the actual holding in that case was the application of a state anti-branching statute applicable to a national bank within that state, the Court at one point in its opinion did deny the existence of any national bank's authority to establish a branch. 263 U.S. at 656-58. Moreover, later in the opinion the Court commented:

> "[N]ational banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them. If the nonexistence of such branches, or the absence of power to create them, has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as Federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission." 263 U.S. at 659.

main bank, provided that the state in which the bank was located allowed branch banking. Extended in 1933 to grant certain additional branching powers, the 1927 Act forms the basis of the present Section 36(c) of the National Banking Act.

In the *Walker Bank* case, supra, Justice Clark, after concluding his historical analysis of the National Banking Act, returned to consideration of the present statute with the following words:

> "It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of *'competitive equality'* insofar as branch banking was concerned." 385 U.S. at 261 [Emphasis added.]

The United States Comptroller in *Walker Bank* had argued to the Supreme Court that if state law allows *any type* of branching, the prohibitions in Section 36(c) are not applicable and, therefore, national banks may establish branches in violation of specific state regulations. Justice Clark's analysis demonstrates the Court's overwhelming acceptance of the philosophy of "competitive equality":

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that

> the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank.
>
> "The Comptroller also contends that the Act supersedes state law only as to 'whether' and 'where' branches may be located and not the 'method' by which this is effected.
>
> "We believe that where a State allows branching only by taking over an existing bank, it expresses as much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. *As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of § 36(c) (1) and (2), regardless of the tag placed upon it.*" 385 U.S. at 261-62. [Emphasis added.]

The philosophy of "competitive equality" clearly had been dominant in the minds of the 1927 and 1933 legislators; however, before *Walker Bank,* courts had sometimes subordinated it to the desire to adhere to federal law. See *First National Bank of Smithfield* v. *Saxon,* 4 Cir. 1965, 352 F.2d 267, 271-72 (which the Supreme Court in *Walker Bank* expressly found to be in conflict with the decisions which it was affirming); *Camden Trust Co.* v. *Gidney,* D.C. Cir. 1962, 301 F.2d 521, cert. den., 369 U.S. 886, 82 S.Ct. 1158, 8 L. Ed. 2d 287 (in which the Court refused to classify a "new" bank as a branch, and in doing so completely ignored the contention by the State of New Jersey, in an amicus brief, that permission for such operation would not be granted to a state bank); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.,* D.C. Cir. 1963, 323 F.2d 290, reversed on other grounds, 1965, 379 U.S. 411, 85 S.Ct. 551, 13 L. Ed. 2d 386 (in which the Court

classified a "new" bank as a branch, but did so without reference to state law); *Jackson* v. *First National Bank of Valdosta,* M.D. Ga. 1965, 246 F. Supp. 134, 138 (in which the Court stated specifically: "This court is convinced that in construing the definition of 'branch' found in 12 U.S.C.A. § 36(f) it should be guided by federal considerations.").[6]

Following the above authority, First National attempts to convince us that Section 33(f) of the National Banking Act is still the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36(f), "deposits are received, or checks paid, or money lent." Such a line of argument, even before *Walker Bank,* would not have been acceptable in our Circuit. Now it is indefensible.

In 1965 our Court held that courts must not look to Section 36(f) as their sole guiding light but must permit rays of state law to refract and reflect their

---

[6] A persuasive argument against complete "competitive equality" as to branch banking can be found in Comment, "Federalism in Interpretation of Branch Banking Legislation," 32 *U. Chi. L. Rev.* 148 (1964). The author in this pre-*Walker Bank* Comment urges that federal courts adopt federal definitions of the term "branch" based essentially on the economical realities of banking. Although well-reasoned and well-documented, the Comment fails in its attempt to justify its position in regard to the National Banking Act, and specifically Section 36(c). Compare Note, 64 *Mich. L. Rev.* 155 (1965) which espouses the philosophy of "competitive equality." See also Comment, "Branch Banking: The Current Controversy," 16 *Stanford L. Rev.* 983 (1964), which pictures the relatively recent re-emergence of this issue into the political arena. In Comment, "Present Banking Structure in Florida and Branch Banking," 20 *Florida L. Rev.* 84, 98-101 (1967), the authors relate the *Walker Bank* decision to current Florida law and even mention the opinion of the district court in the case at bar.

statutory vision. In *Jackson* v. *National Bank of Valdosta,* 5 Cir. 1965, 349 F.2d 71,[7] we quoted Section 36(c) and Section 36(f) and then concluded:

> "Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office. In this way, Congress sought to insure equality between state and national banks regarding the establishment of branches." 349 F.2d at 72.

After quoting the applicable state statute, we continued.

> "Therefore a state bank, located at Valdosta, already having one office or facility in that city, could not open another office or facility there. Consequently, First National likewise could not, under § 36(c), open such a facility." 349 F.2d at 73.

Finally, in discussing the application of Section 36(c), we espoused what was later to be adopted by the Supreme Court as the policy of "competitive equality":

> "That statute [Section 36(c)] is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and South Dakota, supra [*South Dakota* v. *National Bank of South Dakota,* D.S.D. 1963,

[7] Our opinion in *Jackson* preceded the district court's published opinion on remand, cited *supra.* As is evident from our excerpts from the two opinions, the distinguished district judge at that time espoused a different view as to the priorities of branch banking legislation than that expressed in the opinion by our Court.

> 219 F. Supp. 842] at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct *'policy of equalization'* for our dual banking system." 349 F.2d at 74. [Emphasis added.]

Our opinion in *Jackson* was relied on extensively in *State Chartered Banks in Washington* v. *Peoples National Bank of Washington,* W.D. Wash. 1966, No. 6338 (unpublished memorandum decision), a case in which the exact legal issue at bar was squarely before the court. Unfortunately Judge Lindberg's scholarly analysis, which was written before the *Walker Bank* decision, was never published. We therefore quote from it liberally:

> "The issue on the merits is whether the proposed drive-in facility is an illegal branch of a national bank under the provisions of 12 U.S.C.§ 36. The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." p. 15.
>
> * * * * *
>
> "The scope of the term 'branch' is set forth in section 36(f). That section states the term 'branch' shall be 'held to include any branch bank, branch office * * * additional office * * * at which deposits are received or checks paid, or money lent.' Some writers have considered this section as defining the word 'branch.' Judge Holtzoff referred to this

subsection as a definition [in *Michigan National Bank* v. *Saxon*, D.C. 1962, Civil No. 82162 (unpublished opinion)] and so did Judge Bootle [in *Jackson* v. *First National Bank of Valdosta, supra*]. It is with much respect and deference that I venture to disagree with their characterization. I feel that the section should not be given the prestige of a definition if it does not meet the standards of a definition. Congress has nearly two hundred years of experience in enacting statutory definitions. If that body had wished to formulate a true definition I do not believe that the term defined would have appeared as both the subject and the predicate of the definition. Further, the opening paragraph of section 36 clearly indicates that the section was not intended to provide any definitions as such. It states:

> 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'

Subsection (c) [sic] of Section 36 may be a partial definition or a description of what *may be* included within the term 'branch.' It was not intended to be exhaustive. It provides only a broad, functional measuring gauge of what a branch may be. As I read it, the words 'additional office * * * at which deposits are received, or checks paid, or money lent,' provide only a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play. This is what I feel is the import of the Court of Appeals' decision in *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71.

In the *Valdosta* case the state superintendent of banking, by issuing regulations, chose to expand

somewhat this partial definition of 'branch.' The regulations provided that if the drive-in teller facilities were within the boundaries of a single contiguous area, or were across the street but connected by a tunnel or overhead passage, it would not be considered as a branch; it would instead be considered as an expansion of the existing facility. Therefore, when looking at a new national bank facility in Georgia the Comptroller is *required* (by the *Georgia* law) to consider contiguity and physical connection; these may determine the character of the facility. This decision makes it fairly clear that once the facility passes the broad functional test set forth in section 36(f) the state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy. This was precisely the purpose Congress had in mind when it passed the McFadden Act. See *Walker Bank & Trust Company* v. *Saxon,* supra [the case which was later affirmed by the Supreme Court]. The *Walker* case also emphasized the role of state law in branching by saying, 'We believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it.' Id. p. 94. But see *First National Bank of Smithfield* v. *Saxon,* 352 F.2d 267, 271 (4 Cir. 1965) [see our mention of this case, *supra,* and its treatment by the Supreme Court in the *Walker Bank* decision].

The test of 'branchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36 (f), and if so, (2) Does the state law add many more refinements to the definition?

Although defendant argues that Peoples Bank fails to meet the requirements of section 36(f), it

admits (or rather does not contest) the fact that the proposed facility will receive deposits and pay checks. However, the defendant asserts that 'only a part'—25%—of the check-cashing process will be carried out at the proposed facility. They claim that the physical acceptance of the check and payment of the money to the payee constitute only about 25% of the operations connected with check cashing. The remaining operations, such as entry on the books and transmittal of the instrument to the drawee bank, make up the other 75% of the check-cashing process. That may well be. However, the check is nevertheless cashed within the meaning of section 36(f) when the instrument is accepted from and the money paid to the holder. The remaining operations are done so that the transaction is reflected on the books of the bank and to insure that the cashing bank is repaid by the drawee bank.

When the bank accepts the instrument and pays the holder the check is 'cashed,'—*all* cashed, not 25%, or 50%, but 100% cashed. True, the remaining operations are part of the *check-cashing process,* but the act of check-cashing is complete after receipt of the check and payment of the money; and it is the *act* of check-cashing that is contemplated by section 36(f). The reason for making this distinction is because the defendant in argument attempted to equate the act of check-cashing with the process of check-cashing. They are not identical. This effort at blurring the differences was apparently done for the purpose of showing 'oneness' between the new facility and the principal office at 222 Williams Street. However, 'branchness' is a combination of function and physicality—not bookkeeping. See *Jackson* v.

First National Bank of Valdosta, 246 F. Supp. 134 (D. Ga. 1965). And any effort to inject the 'unity of operation' test into this case is merely another attempt to avoid confrontation with state law. This test was rejected by the district court in *Bank of Valdosta* and under banking laws more liberal than those in the State of Washington.

Having discussed functional characteristics under the federal statute, we now turn to the physical aspect. *Prima facie,* can the proposed facility be properly termed an 'additional office?' If it can, we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character. This proposed facility is some 260 feet or more from the principal office, on a separate lot, in another block, across a busy thoroughfare, has a different address, and is in a completely disconnected building. No stretching of the term 'additional office' is required at all to see it fits perfectly. The proposed facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C. § 36(f)).

From this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not. This has been plainly stated as noted earlier in his opinion in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71, and *Walker Bank & Trust Company* v. *Saxon, supra.* The rest of the inquiry is therefore confined to ascertaining what category this facility falls into if it were being constructed solely under the dominion of state law." pp. 21-25.

* * * * *

"It is a branch.

It is a branch and it would seem that the Comptroller would have found it to be a branch if he had measured this proposal by the state law of Washington. But he did not. He ignored it, as the Deputy Comptroller stated in his testimony on the stand. In deciding upon the character of this structure the Comptroller did not even consider state law. His apparently deliberate non-observance of the state law was arbitrary, not in accordance with the law, not in accordance with the procedure required by the law, and unwarranted by the facts. See *Bank of Valdosta,* 349 F.2d 71." pp. 28-29.

The above analysis by Judge Lindberg represents an accurate and perceptive application of our statement of policy in *Jackson,* and we subscribe to it without hesitation. We do so on two important grounds. First, we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language. Second, we will not choose to overlook state law in penumbral areas when the thrust of the National Banking Act is "competitive equality" between national and state branching authority.

Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term "branch" "shall be held to include" these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking. If we construed Section 36(f) as permitting

paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths. We repeat the words of Judge Gewin, speaking for our Court en banc, in *Miller* v. *Amusement Enterprises Inc.*, 5 Cir. 1968, 394 F.2d 342, 353:

> "We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. Our system does not favor mechanical jurisprudence; it seeks to find the purpose and spirit of a statute and the intention of its makers. Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L. Ed. 226, 228; National Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L. Ed. 2d 357, 364."

See also *Lawson* v. *Suwanee Fruit & Steamship Co.*, 1949, 336 U.S. 198, 200-201, 69 S.Ct. 503, 93 L. Ed. 611, 614-15, applying the above principles to statutory definitions.

Having concluded that Congress did not seek to devitalize Section 36(f) with enternally static concepts, we likewise conclude that flexibility is to be accorded not by any federal common law on branching, but rather by recourse to state law. To hold otherwise would violate the specific teachings of *Jackson* and *Peoples National Bank* and would severely challenge the policy of "competitive equality" which the Supreme Court has so recently established. It would allow the United States Comptroller, by means of oracular definitions, to distort what states believed was banking into non-banking. To be sure, national banks may well fear the authority of state comptrollers to

make extreme use of this same defining process, but their recourse must be to Congress which legislated "competitive equality," not to the courts who must follow it.

Although there are acerbities and exacerbations natural to our dual banking system, Congress has sought to provide competitive access to the marts of banking. The Congressional enactments do not assure economic equilibrium, but they do assure a measure of equality of economic opportunity. We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida.

Section 659.01(1)(a) of the Florida Statutes, note 1 *supra,* is quite broad in stating that a bank "shall have only one place of doing business." As yet, no court opinion has considered the applicability of this statute to receptacle and armored car services, although a similar action is now pending in a Florida state court. *Dickinson* v. *The Tallahassee Bank and Trust Co.,* 2d Jud. Cir., Leon County No. 68-30.[8] The Comptroller of the State of Florida, however, in his letter to the First National dated September 28, 1966, specifically ruled that "these two activities are in violation of Section 659.06(1)(a), Florida Statutes." Such a ruling may sometimes constitute the only "law" of the state, cf. *United States* v. *Howard,* 1957, 352 U.S. 212, 77 S.Ct. 303, 1 L. Ed. 2d 261, and we should follow it when, as here, it appears consistent with the policy of the state statute. See *Jackson* v. *First National Bank of Valdosta, supra,* 349 F.2d at 73.[9]

---

[8] On January 18, 1968, the state court approved a request for a form of abstention-in-reverse and reset the final hearing in its case until after our Court had interpreted the Florida statute in the case at bar.

[9] Compare *Leuthold* v. *Camp,* D. Mont. 1967, 273 F. Supp. 695, 699 (at [11]), where that court found that the Montana Attorney General's ruling was inconsistent with the applicable state statutes.

The Florida statute permits only one place of business, and this direction is uncomplicated, unhedged, and unmodified. "Doing business" in Florida can be minimal. Cf. *Phillips* v. *Hooper Chemical Corp.*, 5 Cir. 1967, 375 F.2d 189. Unless we were to cast away all concepts of the functional "business" of a bank, we would have to conclude that First National was "doing business" with its extra services.

As is indicated by the pending litigation, our opinion will probably not be the final interpretation of Florida law as it relates to the activities in question. On remand, therefore, the district court should enter a conditional decree in order that the judgment in this particular controversy is not deemed res judicata in the event of a conflicting statutory interpretation by the Florida state courts. Such remedy was clearly provided for in *Burton* v. *State Farm Mutual Automobile Ins. Co.*, 5 Cir. 1964, 335 F.2d 317, 324, where Judge Brown stated:

> "[W]here things depend on the outcome of litigation elsewhere, or future developments as to controlling substantive or procedural law, the Federal Court has the power—and the duty where appropriate—to enter a conditional order or decree."

The district court should retain jurisdiction, and if Florida law is ultimately determined to be different than here expounded, the court can re-lense its optical view of First National's activities as they relate to Section 36(c) of the National Banking Act.

REVERSED and REMANDED for entry of a judgment in accordance with this opinion.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for entry of a judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, The First National Bank in Plant City, Plant City, Florida, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 12, 1968

Issued as Mandate:

APPENDIX B

MEMORANDUM DECISION, FILED ON MAY 6, 1967
[R. 704-715]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

Tallahassee Civil Action No. 1216

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida, *Plaintiff*,

and

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Plaintiff-Invervenor*,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida; Ex Officio Commissioner of Banking, *Defendant*,

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; and PEOPLES BANK OF LAKELAND, *Defendant-Intervenors*.

MEMORANDUM DECISION

This action was initiated by the First National Bank in Plant City against the Comptroller of the State of Florida in his additional capacity as Commissioner of Banking. The complaint alleged that the State Comptroller had advised the bank that its armored car messenger service for pick up and delivery of cash and other items was a violation of Section 659.06(1)(a) Florida Statutes F.S.A. which provides that "the business of a bank" shall be transacted only at its banking house. The bank asked the Court to declare that its

messenger service was not in violation of Section 659.06 (1) (a); to enjoin the State Comptroller from "interfering with the lawful operations of Plaintiff"; and for various judgments declaring the relationship of state and federal banking officials and banking laws.

In his answer to the complaint the defendant referred to section 659.06(1)(a) of the Florida Statutes F.S.A. and to the provisions of the National Bank Act contained at 12 U.S.C. §§ 36 and 81 in support of his position that the bank's activities were unlawful.

Shortly after the federal court proceedings were initiated the State Comptroller filed suit in a state court alleging violation of 659.06(1) (a).

On October 20, 1966 this Court issued its Orders staying proceedings in the State Court and temporarily restraining the State Comptroller from interfering with the plaintiff herein in its conduct of armored car and receptacle services.

Subsequently, three state banks were given leave to intervene permissively as defendants, Brinks, Inc. and the Independent Bankers Associations of Florida and of the United States were permitted to participate as amici curiae and the United States Comptroller of the Currency was granted leave to intervene as a plaintiff.

Both plaintiffs have now moved for summary judgment, memoranda of law with respect thereto have been filed and considered and the Court has heard argument on the motions in open court. By order of the Court, the two issues of the State Comptroller's authority to regulate national banks and of whether the messenger and receptacle services in question constitute an incidental power which can be properly exercised by a national bank pursuant to 12 U.S.C. § 24 (seventh), although raised by the motions for summary judgment, have been deferred for whatever further consideration may be appropriate.

The record before the Court indicates that the United States Comptroller of the Currency has published in his Manual for National Banks, Ruling 7490 [1] which authorized, with various conditions, the provision by national banks of an armored car messenger service to pick up and deliver monies and other items from and to their customers.

On the basis of the Comptroller's ruling and of various communications from the Comptroller's Office, First National Bank in Plant City, in September of 1966 inaugurated a service whereby an armored car owned by the bank and operated by its employee would pick up cash, checks or other items from customers of the bank for deposit to their accounts at the bank. In addition the messenger would deliver cash to customers upon their request. Furthermore, the bank caused a concrete receptacle to be constructed in a shopping center into which items could be placed for pick up by the bank's messenger.

The Comptroller's ruling requires that an agreement be entered into by the bank and its customer using the messenger service providing that the "messenger is the agent of the customer rather than the bank." The record [2] shows that the practice prescribed by the bank and

---

[1] 7490. MESSENGER SERVICE

To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

[2] By the Court's order plaintiff produced the names of 10 percent of its customers for deposition by defendants. Conclusions in this decision with respect to the bank's operations are based on those depositions and on the affidavits submitted by all parties.

normally followed by its customers was for the customer sending money for deposit to fill out and attach to the items given the messenger or placed in the receptacle a "Messenger Transmittal" which included the following language:

> First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

Furthermore, most of those sending money for deposit and all customers to whom cash was delivered had signed a "Comprehensive Dual Control Contract" which provided that

> As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

When money was delivered to customers it was accompanied by a slip which stated

> Your account has been charged for the TOTAL shown herein representing monies requisitioned for delivery to you by bank's messenger.

The concrete receptacle bore a legend stating in similar terms that monies placed therein would not be

deemed deposited until received at the bank's main banking premises.

On these facts, the defendant argued that the messenger and receptacle services, as authorized by the federal Comptroller and conducted by the First National Bank, constitute branch banking in violation of 12 U.S.C. § 36(c)[3] which generally forbids national banks to branch in those states in which branching is forbidden to State chartered banks. In addition, defendants urged that the services in question involve doing the "general banking business" away from the main premises of the bank in violation of 12 U.S.C. § 81.[4]

While acknowledging that the branching section of the National Bank Act contains, at 12 U.S.C. § 36(f), a description of the term branch:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent;

---

[3] 12 U.S.C. § 36(c) provides in pertinent part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (* * *) (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication of recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

[4] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

defendants deny that this section constitutes an exclusive definition and suggest that state law must be considered, as well, in defining a national bank branch. Further, defendants contend that even if one of the three functions enumerated in 12 U.S.C. § 36(f), that is, receiving deposits, paying checks, or making loans must be present, before a particular activity may be properly deemed branching, nevertheless the activities in question here involved both receiving deposits and paying checks away from the banking house.

It is argued that no real agency relationship exists between the customer and the messenger in that bank owns the armored truck, pays the messenger and insures the monies while they are in transit.

Furthermore, defendants contend, facts in the record indicate that from time to time variations from the general procedures occur, such as the failure to use the transmittal slip. These variations, it is argued, disrupt whatever agency relationship may normally exist.

Finally defendants urge that the principle of "competitive equality" governs the relations between National and State banks and that, as Florida state banks may not operate armored car services national banks should not be permitted to do so.

Plaintiffs, on the other hand, take the position that 12 U.S.C. § 36(f) is plainly a definition of the term branch as it applies to a national bank, and argue that unless one of the three functions there described is present the operation is not a branch.

A deposit relationship is one of contract, plaintiffs argue, and the bank and its customers contract, by means of the various forms which accompany cash and other items passing back and forth, that the deposit does not take place until the funds are received by a teller at the bank's premises and the deposit ends by

means of the charge to the customer's account prior to delivery by the messenger.

Plaintiffs further contend that the agency agreement is an additional contractual arrangement to make abundantly clear that, as the monies are being transported by someone acting in the capacity of agent for the customer, they are not legally in the possession of the bank until they reach the bank's premises or after they have been subsequently withdrawn from the bank for redelivery.

As to the Section 81 question the Federal Comptroller and the national bank take the position that this section requires only that the "general business" of a national bank be transacted at its main office and that judicial and administrative interpretation through the years have made it clear that substantial activities, including particularly agency operations, may be conducted away from the main banking house.

Each of the above positions, plaintiffs say, are subscribed to by the Federal Reserve Board[5] and the Federal Deposit Insurance Corporation with respect to the banks under their jurisdiction for various purposes.

Finally plaintiffs urge that the question of competitive equality between the two banking systems comes into play only with respect to the authority to establish branches. If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.

The issues presented by these motions are complex but the Court is persuaded, after consideration of the briefs and argument and the facts in the record, that the armored car and receptacle services authorized by the Comptroller and customarily and ordinarily oper-

[5] The Board's ruling on the subject is published at 12 C.F.R. 208.110.

ated by First National Bank in Plant City do not constitute branching or the "general banking business," in violation of 12 U.S.C. §§ 36 or 81 and that Florida statute 659.06(1) (a), F.S.A. is not operative or controlling in this instance.[6]

The definition of branch contained at 12 U.S.C. § 36(f) must be deemed to be the exclusive definition with respect to national banks. *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134 (D.C. Ga. 1965).

To argue that deposits are received or checks paid away from the banking premises is to ignore the plain effect of the deposit and agency contracts entered into by the bank and its customers. "The relation of depositor and banker arises only out of contract, express or implied" 9 C.J.S. Banks and Banking § 267, p. 545. See also *McCrory Stores Corporation* v. *Tunnicliffe,* 104 Fla. 683, 140 So. 806 (1932).

Defendants' reliance on the elements of control and employment to show that the messenger is in reality the agent of the bank is misplaced. Such factors cannot alter the import of an unambiguous contract between the parties. What is evidentially created here is a dual agency in which the messenger acts as agent for the customer for certain purposes and for the bank in other respects.

The record indicates that the off-premises receptacle is used as a storage place for cash and other items until they are packed up by the messenger, an arrangement analogous to night-depositories found at most banks. It is well settled that the placement of

---

[6] Defendants' counterclaims also refer to Florida statute 659.52 F.S.A. No explanation as to this allegation has been offered. Furthermore, that section, which deals with banking business by unauthorized *persons,* appears on its face to be inapplicable to the situation presented in this case.

funds in such depositories does not create a depositor-depositee relationship but rather one of bailor-bailee. *Bernstein* v. *Northwestern National Bank,* 157 Pa. Super. 73, 41 A2d 440; 10 Am. Jur. 2d § 358.

Once it is established that the activities in question here do not constitute branching, it is not difficult to conclude that they are not "the general banking business" off premises in violation of 12 U.S.C. § 81. The United States Supreme Court has held that

> * * * The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. *Merchants' Nat. Bank* v. *State Nat. Bank,* 10 Wall. 604, 74 U.S. 604, 650, 651, 19 L. Ed. 1008 (1870).

And in 1911, the Attorney General of the United States, in considering whether national banks had power to establish branches, said.

> These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist in fact is obvious.

> An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate or-

> ganization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution. 29 Ops. Atty. Gen. 81 (1911).

While not venturing any detailed observations on the question of competitive equality between the national and state banking systems it is clear that once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching. And defendants, in their pleadings, have not alleged the violation of Florida law in any other respect.

At the hearing on these motions defendants objected to the entry of summary judgment on the ground that substantial dispute existed with respect to the manner in which First National Bank and its customers were actually implementing the arrangements discussed earlier in this Memorandum Decision. For this reason, it was argued, the matter should be set for trial so that complete evidence could be developed with respect to variations from the facts already established.

In declaring judgment on the issues involved in this partial summary judgment the Court passes only on the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect. The fact that in particular instances a customer or one of the bank's employees may have deviated from the authorized and established procedures does not detract from their lawfulness. The record affirmatively shows that the bank has actually carried out its declared intent in the execution of the specific operation to a substantial degree. This is enough to entitle it to a judicial determination of legal efficacy in this declaratory decree action.

This Court does not intend to consider every transaction which has taken place since the messenger service was inaugurated in search of the occasion when the wrong transmittal slip was used or a customer delivered money to the messenger without a clear understanding that his deposit would not take place until the money reached the bank.

For instance, facts are before the Court with respect to an arrangement whereby the bank delivers change to its customers as part of a transaction in which cash or a check in the amount of the change delivered is presented to the messenger for deposit to a special change account not otherwise sufficiently funded. The Court is of the opinion that at least insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises and to that extent is not approved by this Court. This may well require a showing of actual accounts being debited at the bank in advance of the service.

However, the Court is convinced from the record before it that the Comptroller's ruling is not in conflict with 12 U.S.C. §36 or 81 and that at least substantial compliance with that ruling is manifest in the record here.

The Court concludes that there is no genuine issue of material fact and that plaintiffs are entitled to partial summary judgment as a matter of law in accordance with Rule 56, Federal Rules of Civil Procedure.

Accordingly, order to this effect will be entered.

G. HARROLD CARSWELL
G. Harrold Carswell
United States District Judge

ORDER FILED ON MAY, 6, 1967 [R. 715-716]

ORDER

This matter having come on for hearing on the motions of plaintiff and plaintiff-intervenor for summary judgment and the Court having considered the memoranda of law submitted and the argument of the parties in open court, and the Court having determined, in accordance with Rule 56, Federal Rules of Civil Procedure, that there is no genuine issue of material fact and that plaintiff and plaintiff-intervenor are entitled to judgment as a matter of law with respect to their allegations that the messenger service and receptacle operations authorized by the United States Comptroller of the Currency and customarily conducted by the First National Bank in Plant City are not violative of 12 U.S.C. 36 and 12 U.S.C. 81, it is hereby

ORDERED, ADJUDGED and DECREED:

(1) That the motions of the plaintiff and plaintiff-intervenor for summary judgment with respect to the issues raised concerning the application of 12 U.S.C. 36 (sic) and 12 U.S.C. 81, be and the same hereby are GRANTED.

(2) That the remaining issues raised by the motions for summary judgment, that is, the validity of the defense interposed by intervenor-defendants with respect to the application of 12 U.S.C. 24 (seventh) to the services referred to in Paragraph 1 above and the authority of the State Comptroller to intervene in the affairs of national banks will be carried forward for further hearing and consideration by this Court, will

be made the subject matter of another and separate order.

DONE and ORDERED this 6th day of May, 1967.

G. HARROLD CARSWELL
G. Harrold Carswell
United States District Judge

FINAL JUDGMENT, FILED ON JUNE 2, 1967 [R. 716-719]

FINAL JUDGMENT

By its order of May 6, 1967, this Court granted partial summary judgment for plaintiffs for the reasons and to the extent set forth in that order and the accompanying memorandum decision. That order further stated that the question of the incidental powers of national banks pursuant to 12 U.S.C. 24 (seventh) would be the subject of a future order. The Court has now concluded that in view of the Court's disposition of the other issues raised a decision as to the effect of 12 U.S.C. 24 (seventh) is not appropriate or necessary, the Court declines to rule on that issue. Accordingly, the motion to strike that defense filed by plaintiff is moot. Therefore, the Court now enters final judgment as follows:

ORDERED, ADJUDGED and DECREED that

1. The First National Bank in Plant City was duly authorized by the Comptroller of the Currency of the United States to conduct armored car messenger and off-premises receptacle services consistent with the Comptroller's ruling 7490.

2. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not branches within the meaning of 12 U.S.C. 36 or in contravention of Section 659.06(1) (a) Florida Statutes.

3. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City do not violate 12 U.S.C. 81.

4. The armored car messenger service and off-prem-

ises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not in violation of or in conflict with Florida law.

5. Although plaintiff First National Bank in Plant City is entitled to a decree permanently enjoining Fred O. Dickinson, Jr., Comptroller of the State of Florida from interfering with the bank's operation of its armored car messenger and off-premises receptacle services, the defendant State Comptroller has stipulated in open court his intention to abide this Court's order without necessity for further injunctive relief, permanent injunction will therefore be withheld.

It is further ORDERED, ADJUDGED and DECREED that the Court's order of May 6, 1967, granting partial summary judgment and the accompanying memorandum decision are hereby incorporated in full into this Final Judgment.

In view of the Court's disposition of this case as ordered above, it is further ORDERED, ADJUDGED and DECREED that to the extent not heretofore granted or denied, intervening defendants' motions to produce, and motions to strike be and the same hereby are denied, and that plaintiff-intervenors' objections to interrogatories and motion for protective order be and the same hereby are sustained.

It is further ORDERED, ADJUDGED and DECREED that the temporary injunction entered against the defendant State Comptroller pending final determination in this action is dissolved and that the plaintiff First National Bank in Plant City and Home Indemnity Company, as its bondsman, be and the same hereby are discharged from any liability under the bond in the amount of $2,500 previously required by this Court's order,

It is further ORDERED, ADJUDGED and DECREED that the Court's Order Staying Proceedings in Case No. 155831 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida pending final disposition of this matter, be and the same hereby is rescinded and set aside upon assurance by counsel for the defendant Comptroller that motion to dismiss will be filed promptly in that cause of action previously enjoined.

It is further ORDERED, ADJUDGED and DECREED that all counter claims filed by defendant and intervening defendants be and the same hereby are dismissed with prejudice and final judgment is hereby entered for plaintiffs and against defendant and intervening defendants.

DONE and ORDERED in Chambers at Tallahassee this 2nd day of June 1967.

G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

APPENDIX C

12 U.S.C. 36 provides as follows:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of

such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an iden-

tically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to state banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community.

Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The original text of Section 7 of the McFadden Act of 1927 (44 Stat. 1228-1229), from which 12 U.S.C. 36 is derived, was as follows:

> Section 7. That section 5155 of the Revised Statutes of the United States be amended to read as follows:
>
> "SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> "(a) A national banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.
>
> "(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.
>
> "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.
>
> "(d) No branch shall be established after the date of the approval of this Act within the limits

of any city, town, or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population, so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

"(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

"(h) The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

Section 659.06(1) (a) of the Florida Statutes provides:

> Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the commissioner may require.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968—330-893/406